Office-Supreme Court, U.S.
FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID M. WOLLMAN, PETITIONER

V.

JAKE GROSS, JR., RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

* *

PETITIONER'S REPLY BRIEF

PER RULE 22.5

* *

John N. Gridley, III
101 S. Main
Suite 402
Sioux Falls, SD 57102

(605) 339-1748

N. Dean Nasser, Jr.
101 S. Main
Suite 404
Sioux Falls, SD 57102

(605) 335-0001

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I.

The Court of Appeals did misapply the Kubrick decision, since the purpose of the F.T.C.A. two-year limitations period is to prod claimants into inquiries about the "legal implications" of known not unknown "critical facts"; further, that, therefore, the panel decision in the instant case conflicts with U.S. vs. Kubrick, 444 U.S. 111 (1979).

II.

This is an appropriate case in which to resolve the conflict between Kelley (Second Circuit) and Meeker (Eighth Circuit).

TABLE OF CONTENTS

Questions presented for Review . . . . . (i)

Table of Contents . . . . . (ii)

Table of Authorities . . . . . (iii)

List of All Parties to the Proceeding 1

Grounds Upon Which the Jurisdiction of the Supreme Court is Invoked 2

The Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Which the Instant Case Involves 2

Statement of the Case 2

I. Procedural History (Showing Jurisdiction in District Court . 2

II. Facts 2

Reasons for Granting the Writ 3

1. The Court of Appeals did misapply the Kubrick decision, since the purpose of the F.T.C.A. two-year limitations period is to prod claimants into inquiries about the "legal implications" of known not unknown "critical facts"; further, that, therefore, the panel decision in the instant case conflicts with U.S. vs. Kubrick, 444 U.S. 111 (1979). . . 3

2. This is an appropriate case in which to resolve the conflict between Kelley vs. United States, 568 F 2d 259, Cert. Denied 439 US 830, and Meeker vs. United States, 435 F 2d 1219 (8th Cir. 1970) . 5

Conclusion 9

Signatures 9

TABLE OF AUTHORITIES

Cases:

Kelley vs. United States, 568 F 2d 259, (2d Cir. 1978) 5,6, 7,8

Meeker vs. United States, 435 F 2d 1219 (8th Cir. 1970) 5,6, 7,8

United States vs. Kubrick, 444 U.S. 111 (1979) 3,4, 5,8, 9

United States vs. LePatourel, 593 F 2d 827 (8th Cir. 1979) (en banc) 8

LIST OF ALL PARTIES TO THE PROCEEDING

1. David M. Wollman, Plaintiff and Petitioner.
2. Jake Gross, Jr., Defendant (Federal Employee).
3. United States of America, Substituted Defendant.
4. Western Casualty and Surety Company, Fort Scott, Kansas, (the private insurer of Jake Gross, Jr.) appearing by permission of the district court through Timothy J. Nimick, Attorney at Law, Sioux Falls, South Dakota. While the private insurer is technically not a named party, its interest was acknowledged by the district court and Mr. Nimick was given standing to appear in the courts below.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The petitioner relies upon its statement of grounds contained on page 3 of the Petition for Writ of Certiorari previously filed in this matter.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS WHICH THE INSTANT CASE INVOLVES ARE CITED AS FOLLOWS: None

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY (SHOWING JURISDICTION IN DISTRICT COURT)

II. FACTS

The petitioner incorporates herein by reference its statement of the case contained on pages 5-13 of his Petition for Writ of Certiorari previously filed in this matter.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS DID MISAPPLY THE KUBRICK DECISION, SINCE THE PURPOSE OF THE F.T.C.A. TWO-YEAR LIMITATIONS PERIOD IS TO PROD CLAIMANTS INTO INQUIRIES ABOUT THE "LEGAL IMPLICATIONS" OF KNOWN NOT UNKNOWN "CRITICAL FACTS"; FURTHER, THAT, THEREFORE, THE PANEL DECISION IN THE INSTANT CASE CONFLICTS WITH U.S. VS. KUBRICK, 444 U.S. 111 (1979).

The Respondent in Opposition, the United States, admits in its brief that Kubrick stands for the proposition that the two-year limitations period is designed for barring inquiries into the "legal implications" of known facts, but not of "critical facts" which were unknown and could not with reasonable diligence have been discovered within the two-year limitations period. (See R.O.B. page 5) What the Respondent in

Opposition has failed in this case to recognize is the all important distinction that it is not the permanent employment status of the defendant, Jake Gross, Jr., that petitioner did not know, but rather the status of the defendant as of the time of the accident. In other words, the plaintiff did not know the "critical fact" that the defendant had been working in the scope of his Federal employment an hour prior to the accident, which fact resulted in the defendant's being found to be within the scope of his Federal employment an hour later at the time of the accident. It is worthy of note that the Trial Judge stated in his opinion that there were no analogous South Dakota cases on point on the scope of employment question.

The rule as stated in Kubrick addresses fact situations where all of the critical facts are known. The rule, therefore, does not apply in this case. We are

not talking herein about a plaintiff who does not know the legal implication of a known fact, we are talking about a plaintiff who does not know the fact, itself, which would give rise to the legal implication. Kubrick did not address that issue.

2. THIS IS AN APPROPRIATE CASE IN WHICH TO RESOLVE THE CONFLICT BETWEEN KELLEY VS. UNITED STATES, 568 F 2d 259, Cert. Denied 439 US 830, AND MEEKER VS. UNITED STATES, 435 F 2d 1219 (8th Cir. 1970).

The Respondent in Opposition contends that this is an inappropriate case to resolve the aforementioned conflict between the controlling precedents of the Second Circuit Court of Appeals and the Eighth Circuit Court of Appeals due to factual differences between the Kelley case upon which petitioner relies in part and the instant case.

It is extremely important to note that the Respondent in Opposition admits, at page 6 of its brief, that Kelley conflicts with Meeker.

The Respondent in Opposition urges in its brief that the fact that the State Court case in Kelley, supra, was commenced within the two-year period following the injury was the controlling fact in the Kelley case and that the rule in Kelley, therefore, would not apply to the instant case. The said fact, however, was completely immaterial to the blameless ignorance doctrine as expressed in the Kelley case and upon which petitioner relies.

Kelley stood essentially for two main propositions:

1. That the filing of a suit against an individual employee in State Court should satisfy the exhaustion requirement under the F.T.C.A.

2. That blameless ignorance on the part of a reasonably diligent plaintiff is a sufficient reason to postpone the accrual of the F.T.C.A. statute of limitations.

Judge Lay stated in his dissent to the Eighth Circuit's denial of a rehearing en banc:

> I sense that the analysis in Kelley demonstrates that Meeker (an opinion in which I participated) was wrongly decided. The filing of the suit against the individual employee in state court should satisfy the exhaustion requirement under the F.T.C.A.

Judge Lay, and the three judges joining with him in his aforementioned dissent, as well as Judge Adams in his dissent to the panel opinion in the instant case, thought the fact that the instant case was brought more than two years after the injury was totally unimportant and immaterial in construing the rule in Kelley.*

*See Appendix pp 31-34, including footnote #5, and Appendix pp 75-78.

Stressed most heavily, however, in petitioner's argument is the second proposition of Kelley, which is stated above. This proposition in Kelley may be read consistently with Kubrick, supra, and with United States vs. LePatourel, 593 F 2d 827 (8th Cir. 1979) (en banc). The Respondent in Opposition has largely ignored that fact.

In summary on this point there is strong authority for the proposition that Kelley strongly and directly contravenes Meeker, contrary to the irrelevant distinctions drawn by Respondent in Opposition between those two cases. Furthermore, Kelley, Kubrick and LePatourel strongly conflict with the panel decision in the instant case as stated above, and arguably with Meeker.

CONCLUSION

Guidance should be provided by the Supreme Court by resolving the confusion between the various cases, including, but not by way of limitation, deciding whether or not the rule in Kubrick goes beyond medical malpractice cases or is limited thereto (as suggested by the Government), and, therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 18th day of September, 1981.

N. DEAN NASSER, JR.
101 S. Main Ave., Suite 404
Sioux Falls, SD 57102
Attorney for Petitioner

JOHN N. GRIDLEY, III
101 S. Main Ave., Suite 402
Sioux Falls, SD 57102
Attorney for Petitioner